PERISAI WIRA SDN BHD A

v.

HARUM MINAT SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
MARY LIM J
[WRIT SUMMONS NO: 22NCC-994-06-2012]
22 AUGUST 2013

CONTRACT: *Formation - Agreement - Elements for formation of agreement - Whether satisfied - Company resolution for sale of company together with its assets - Specific performance - Whether resolution capable of being an agreement - Price of subject matter - Whether determined - Whether there was consensus ad idem - Whether there was intention to create legal relationship - Whether damages in lieu of specific performance granted - Contracts Act 1950, s. 66* C D

COMPANY LAW: *Resolutions - Specific performance - Claim for - Sale of company together with its assets - Reliance on resolution as agreement - Whether elements of offer, acceptance and consideration present - Whether resolution capable of being an agreement - Contents of resolution - Whether elements for formation of agreement present - Whether resolution contained intention to create legal relationship - Whether remedy of specific performance available* E

CIVIL PROCEDURE: *Pleadings - Facts not pleaded - Whether function of court to improve on parties' plea or case* F

The plaintiff claimed for specific performance of a resolution passed by the first defendant company. In the resolution, the Board of Directors resolved that the directors be authorised to sell the first G defendant, together with its assets to the plaintiff upon certain specified conditions. The one asset which the defendant possessed was a piece of land that the Government of the State of Selangor had agreed to alienate to the first defendant. At the material time, the first defendant had yet to pay the necessary premium and as H such, the title to the said land had not been issued. It was testified that no written sale and purchase agreement was signed. Further, it was alleged that the second defendant (director in the first defendant) had issued a letter of undertaking to, *inter alia*, sell the said land for RM10 million. According to the plaintiff's I executive director, PW1, he made all the necessary payments,

A including, *inter alia*, payment of the premium as well as the sum of RM72,428 as quit rent. The defendants, on the other hand, testified that the parties had not agreed on the price of the said land. In this suit, the plaintiff's claim was premised on enforcing the agreement it had made with the defendants which was based
B on the resolution. Thus, the plaintiff sought, *inter alia*, that (i) the defendants comply with the resolution; (ii) the defendants proceed with the sale and purchase of the first defendant; and (iii) the defendants deliver the title deeds of the land to the plaintiff's lawyers to hold as stakeholders. It was submitted that the offer
C and acceptance to buy and sell the first defendant could be deduced from the oral arrangements between the parties and the payments made on behalf of the defendants must also be taken as evidence to corroborate the existence of the agreement.

D **Held (dismissing plaintiff's claim):**

(1) The resolution, being an internal document, was not capable of being an agreement unless its contents were clear and unequivocal. The document must be capable of deducing the
E intention of the parties to form a legal relationship and the existence of a concluded contract. The essential and basic elements for the formation of an agreement were just not there (*Charles Grenier Sdn Bhd v. Law Wing Hong*; refd). (paras 11, 12 & 14)

F **(2)** The resolution was merely an authorisation to the directors of the first defendant to sell the first defendant company subject to certain express terms and conditions. The elements of an offer, acceptance and consideration were not present in this resolution. It was evident from the contents of the resolution
G that the price of the sale had yet to be determined and agreed between the parties. Hence, this resolution was not capable of amounting to any agreement between the parties. (para 15)

(3) It was different if the plaintiff's pleaded case was that there
H was an agreement between the parties to buy and sell the company and that such an agreement was to be found partly in several material facts such as the resolution, the undertaking and the payments. That was not actually pleaded and it was not the function of the court to guess or improve on any
I parties' plea or case. The plea was quite clear in that the resolution houses the agreement which was sought to be

specially enforced. The resolution did not contain an intention to create legal relationship in the terms sought to be enforced. (paras 19 & 20) A

(4) The price of the subject matter was yet to be determined and was subject to agreement of the parties. Since there was no suggestion of any figure being bandied between the parties or that there was agreement on any figure, there were no circumstances to consider establishing what that price was or that it was indeed RM10 million as claimed by the plaintiff. Further, there was no *consensus ad idem* between the parties on that price. (paras 21 & 22) B C

(5) It could not be readily concluded what was the subject matter of the sale and whether there was any concluded agreement between the parties, be it for the sale of the company together with its assets or the said land alone. While the pleaded case stated about the company, the oral and documentary evidence was about the sale of the land. (para 28) D

(6) The remedy of specific performance was a discretionary remedy guided by certain basic principles; one of which required the plaintiff to plead that it was ready, able and willing to complete the relevant agreement. The plaintiff had not suggested or explained as to why damages were not otherwise an adequate remedy and why the agreement must be specifically enforced. Given that the court did not find any valid and enforceable agreement, this remedy was not available. Further, the plaintiff was required to plead and prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. There was also no evidence of this readiness and willingness on the part of the plaintiff (*Ganam Rajamany v. Samoo Sinniah*; refd). (paras 30 & 31) E F G

(7) The plaintiff had not pleaded for an order of damages *in lieu* of specific performance. Given that the claim was fraught with not just lack of fundamental pleas, but inconsistencies and more, it would require this court to exercise moral justice on the facts of this case. That was not the function of the court. Since the plaintiff itself was uncertain as to what the agreement between the parties was, the court was not able to make any order, let alone a pronouncement that the agreement H I

was not valid or enforceable. An order for the return of any benefits received under s. 66 of the Contracts Act 1950 required the court to first make that finding before proceeding to order that relief. The court was impeded and constrained in making such an order on the present facts and circumstances. (paras 32 & 33)

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 1 LNS 283 SC ***(refd)***

Chan Thiam Teng v. Ban Swee Heng Sdn Bhd [1992] 1 LNS 37 HC ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Chon Then Tick v. Metroplex Development Sdn Bhd [2010] 6 CLJ 572 HC ***(dist)***

Chow Chin Thong v. Dr. Chong Eng Leong [2012] 10 CLJ 273 HC ***(dist)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Lam Eng Rubber Factory (M) v. Lim Beng Yew & 4 Ors [1994] 4 CLJ 376 HC ***(refd)***

New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation) [1986] 1 LNS 30 SC ***(refd)***

Reignmont Estate Sdn Bhd v. Jaya Ikatan Plantations Sdn Bhd [2012] 1 LNS 877 HC ***(dist)***

South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 66
National Land Code, s. 76
Specific Relief Act 1950, s. 11(2)

For the plaintiff - Shahrul Amali Shafie; M/s A Azidin & Shahrul
For the defendants - Pramjit Kaur; M/s Mann & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Mary Lim J:

[1] This is a claim for specific performance of a resolution dated 27 May 2010 passed by the first defendant. In that resolution, the board of directors resolved that the directors be authorised to sell the first defendant together with its assets to the plaintiff upon certain specified conditions.

[2] There was really only one asset that the first defendant possessed, and that was a piece of land that the Government of the State of Selangor had agreed to alienate to the first defendant. That land was located at s. 76 KTN Mukim Labu, Daerah Sepang, Selangor ("the said land"). At the material time, the first defendant had yet to pay the necessary premium and so title to the said land had not been issued. One of the conditions was that the plaintiff was to settle the premium for the said land.

[3] At the trial, the plaintiff's executive director, one Dato' Muhammad bin Abdul Ghani ("PW1") testified that no written sale and purchase agreement was signed because he was approached by the second defendant a week before the expiry of the payment of the land premium after which the alienation of the said land would have lapsed. According to him, it was an oral arrangement between him and the second defendant who had further provided him with several documents as security and a reflection of how serious she was in the agreement. The 2nd defendant had further issued PW1 with a letter of undertaking dated 31 May 2010 to *inter alia* sell the said land for RM10 million. Subsequently, she had also issued a letter dated 6 July 2010 *inter alia* acknowledging the receipt of RM20,000 as part-payment of the sale of the said land.

[4] According to PW1, he made all the necessary payments (through his son) including payment of the premium as well as the sum of RM72,428 as quit rent and RM59,967.50 as surveyors' charges for the first defendant, all in respect of the said land. He also claimed to have made a part-payment of RM20,000 to the second defendant in her capacity as a director and he was supposed to have been advised on the status of the issuance of title to the said land so that the whole transaction could be completed.

[5] He claimed that he was never kept informed and he added that the second defendant was insincere and had refused to complete the transaction. Despite repeated demands including one sent through its lawyers, and the payment of more than 35% of the purchase price, the plaintiff claimed that the defendants had refused to keep up to its end of the bargain. Mohd Zullaimy bin Muhammad ("PW2") confirmed his father's evidence although he was not present during the negotiations between the second defendant and his father.

[6] The second to the fourth defendants held positions as directors and in the case of the third defendant; she was also the company secretary. All of them testified. The third and fourth defendants claimed that only the second defendant was involved in the whole matter, that they had signed undated copies of Form 32A for the transfer of their shares because the second defendant had asked them to do so. Insofar as the deal or the transaction was concerned, although they were made aware of the negotiations by the second defendant, they both claimed that the terms had not been agreed; especially the price of the said land.

[7] As far as the second defendant is concerned, she claimed not to know English and that the documents were all prepared by PW1. She too, claimed that the parties had not agreed on the price of the said land. All the defendants denied that the parties had agreed on a price of RM10 million for the said land.

Findings Of The Court

[8] This is one of those unfortunate cases where the testimonies and evidence led simply do not meet the pleaded case and where the court was compelled to then dismiss the claim. This case illustrates the importance of proper pleadings and the role they play in any given case. This is how the plaintiff has pleaded its case. After the first half a dozen paragraphs, at paras. 7 to 20 of the amended statement of claim, the plaintiff pleaded:

> 7. Pada tarikh 27/5/2010 juga, Defendan Kedua, Ketiga dan Keempat telah menandatangani satu resolusi untuk menjual syarikat Defendan Pertama kepada Plaintif dan melantik Dato' Muhammad bin Abdul Ghani sebagai salah seorang pengarah di dalam syarikat Defendan Pertama untuk menjaga kepentingan Plaintif.
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> 8. Dalam masa yang sama juga, Defendan Kedua dan Keempat juga telah menandatangani Borang 32A Akta Syarikat 1965 yang tidak bertarikh bagi melepaskan jawatan sebagai pengarah dan pemegang saham Defendan Pertama.
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> 9. Dalam masa yang sama juga, Defendan Ketiga telah menandatangani Borang 32A Akta Syarikat 1965 yang tidak bertarikh bagi melepaskan jawatan sebagai pengarah dan pemegang saham Defendan Pertama.

10. Premium yang dijelaskan oleh Plaintif beserta kos-kos yang berkaitan dengan hartanah tersebut adalah menjadi sebagai bayaran pendahuluan kepada pembelian saham Defendan Pertama oleh Plaintif sebanyak Ringgit Malaysia Sepuluh Juta (RM10,000,000.00) sahaja.

11. Plaintif kemudiannya telah di atas permintaan Defendan Pertama dan/atau pengarahnya telah menjelaskan premium daftar pelan dan C.T. pertama sebanyak RM3,419,842.84 bagi pihak Defendan Pertama untuk sebidang tanah yang beralamat di Seksyen 76 Mukim Labu, Daerah Sepang, Negeri Selangor dan kemudiannya dikenali sebagai HS(D) 31981 PT 3990 Mukim Labu, Daerah Sepang, Negeri Selangor.

12. Pada 05/8/2010, Geran Individu Hakmilik Tanah tersebut telah dikeluarkan oleh Pejabat Tanah dan Daerah Sepang atas nama Defendan Pertama sebagai pemilik Hartanah tersebut, namun Defendan Pertama telah gagal untuk memaklumkan akan pengeluaran Geran tersebut kepada Plaintif.

13. Defendan Pertama dan/atau orang yang diberi kuasa oleh Defendan Pertama juga telah secara sembunyi mengambil Geran tersebut akan tetapi telah gagal, enggan atau cuai untuk memaklumkannya kepada Plaintif.

14. Pada 6/7/2010, Defendan Kedua atas kapasiti beliau sebagai salah seorang pengarah Defendan Pertama telah menerima cek BIMB 536121 berjumlah RM20,000.00 yang merupakan sebagai sebahagian bayaran untuk jual beli syarikat.

15. Plaintif juga telah menjelaskan cukai tanah bagi tahun 2010 sebanyak RM72,428.00 dan membayar kesemua kos yang berkenaan termasuk kos juruukur tanah sebanyak RM59,967.50 bagi pengeluaran Geran tersebut berdasarkan representasi dan perjanjian yang dibuat oleh Defendan Pertama dan/atau pengarahnya.

16. Defendan Pertama dan/atau pengarahnya juga telah berjanji untuk menandatangani Perjanjian Jual Beli saham syarikat Defendan Pertama setelah kesemua pembayaran yang berkaitan dengan premium dibuat oleh Plaintif dan setelah Pejabat Tanah dan Daerah Sepang mengeluarkan Geran bagi Hartanah tersebut.

17. Defendan Pertama dan atau pengarahnya telah gagal untuk mematuhi segala perjanjian dan akujanji yang dibuat kepada Plaintif.

A 18. Plaintiff telah beberapa kali meminta Defendan Pertama dan atau pengarahnya untuk menandatangani Perjanjian Jual Beli syarikat namun Defendan Pertama dan/atau pengarahnya gagal berbuat demikian.

B 19. Plaintiff telah melalui peguamcaranya menghantar Notis Tuntutan yang bertarikh 03/04/2012 kepada Defendan Pertama, Kedua, Ketiga dan Keempat untuk mengarahkan supaya Defendan Pertama meneruskan Perjanjian Jual Beli tersebut namun sehingga ke hari ini tiada sebarang tindakan yang diambil oleh Defendan Pertama, Defendan Kedua, C Defendan Ketiga dan Defendan Keempat bagi meneruskan Perjanjian Jual Beli tersebut.

20. Defendan Pertama jelas masih gagal sehingga ke hari ini untuk mematuhi semua akujanji dan perjanjian yang dibuat walaupun wang pendahuluan melebihi 35% telah dibayar oleh D pihak Plaintif.

[9] From the statement of claim, it is quite clear that the plaintiff is seeking to enforce the agreement that it had made with the defendants. That agreement is housed in a resolution of the E first defendant and that is why the plaintiff is seeking the following reliefs:

(i) that the first defendant comply with the resolution of 27 May 2010;

F (ii) that the defendants proceed with the sale and purchase of the first defendant;

(iii) that the defendants deliver the land title to "s. 76 KTN Mukim Labu, Daerah Sepang, Selangor" to the plaintiff's G lawyers to hold as stakeholders;

(iv) costs; and

(v) any other relief as the court deems just and proper.

H **[10]** According to these reliefs, the plaintiff is seeking an order that the defendants do comply with a resolution of the first defendant dated 27 May 2010; that the defendants proceed with an agreement to sell the first defendant; and that the defendants deliver the title deeds to the said land to the plaintiff's lawyers to I hold as stakeholders.

[11] In order for the first three orders to be made, there must be proved at the very least an agreement to that effect. Since the plaintiff is premising its claim of such an agreement in the resolution of 27 May 2010, I agree with the submissions of the defendants that this document, being an internal document is not capable of being an agreement unless of course, if its contents are clear and unequivocal. Similarly in *Lam Eng Rubber Factory (M) v. Lim Beng Yew & Ors* [1994] 4 CLJ 376, the court was perplexed as to how a resolution of a company could be considered as a contract between the parties.

[12] Accepting for a moment that a resolution is capable of being construed as the agreement, in order that this resolution may be considered as a valid agreement in the terms claimed by the plaintiff, it must contain the essential elements of an agreement or contract. It must provide for the parties, the subject matter, the price and most important, the intention to create a legal relationship between these parties. Alternatively, the document must be capable of deducing the intention of the parties to form a legal relationship and the existence of a concluded contract. This was reminded in the oft-cited Court of Appeal case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1997] 1 CLJ 625.

[13] After carefully examining the resolution which was signed by all the defendants, it is apparent that it falls far short of those requirements. This contemporaneous document would generally be more reliable than any oral testimonies given at trial, and it is no exception here, states as follow:

> Directors' Resolution No. 1/2010
>
> SALE OF COMPANY
>
> RESOLVED THAT the Directors of the Company be and is hereby authorised to sell the Company together with its asset (the Company) to Perisai Wira Sdn Bhd ... of ... subject to the following terms and conditions:
>
> (1) The Purchaser will settle the premium (including other payments) amounting to RM3,419,842.84 ... for the piece of Government land under Section 76 KTN Mukim Labu, Daerah Sepang, Selangor;

(2) The price for the sale of the Company will be determined and subject to the agreement of both parties, after the issuance and receipt of title for the abovementioned land; and

(3) On settlement of the purchase price, the Company will be transferred to the Purchaser and all the Directors of the Company will resign, and the Purchaser be appointed as Directors of the Company in their place.

APPOINTMENT OF ADDITIONAL DIRECTOR

RESOLVED THAT upon settlement of the premium by the Purchaser, YBhg Dato' Muhammad bin Abdul Ghani ... be appointed as a Director of the Company.

[14] From the contents of the resolution, I am compelled to agree with the defendants that the essential and basic elements for the formation of an agreement are just not there. Although the court is in agreement that agreements do not have to be formalistic and need not be written, as expressed by the Supreme Court in *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1986] 1 LNS 30; [1987] 2 MLJ 57; these basic elements must be satisfied.

[15] All that this document evinces is merely an authorisation to the directors of the first defendant to sell the first defendant company subject to certain express terms and conditions. There cannot be said that the elements of an offer, acceptance and consideration are at all present in this resolution. It is evident from the contents of the resolution that the price of the sale; if at all it is even the sale of the first defendant and its assets in the first place and which will be discussed later; has yet to be determined and more importantly agreed between the parties. Hence, this resolution is not capable of amounting to any agreement between the parties in the terms as alleged by the plaintiff.

[16] In his submissions, learned counsel for the plaintiff sought to argue that the offer and acceptance to buy and sell the first defendant can be deduced from the oral arrangements between PW1 and DW3 who is the second defendant. The letter of undertaking issued by DW3 and the payments made on behalf of the defendants must also be taken as evidence corroborating the existence of the agreement as pleaded.

[17] In the first place, where the facts and circumstances are ripe, the court can make a determination that an agreement exists, be it by an inference from the language used in the document relied on; the parties' conduct having regard to the surrounding circumstances, or from the object of the contract – see *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 1 LNS 283; [1994] 2 MLJ 754. I appreciate that the plaintiff has drawn my attention to the Supreme Court's decision in *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 at p. 301 (CLJ Rep); [1992] 2 MLJ 355 at p. 362 (MLJ) where the court opined that "the essence of consideration is that the promissee, that is the appellant, has taken upon itself some kind of burden or detriment, …" to say that because the plaintiff has expended all those monies, then there must be an agreement in the terms as claimed. The agreement being, to sell the first defendant together with its assets at RM10 million.

[18] However, as pointed out earlier, the pleaded case is that the agreement which is sought to be specifically enforced is to be found in the resolution itself. It is said to be complete and comprehensive of all the requisites for the formation of a valid and enforceable contract or agreement. The acts of the defendants including the undertaking are merely executory acts corroborating the claim that such an agreement exists.

[19] It is different if the plaintiff's pleaded case is that there is an agreement between the parties to buy and sell the company; and that such an agreement is to be found partly in several material facts such as the resolution, the undertaking, and the payments. That may well have been what the plaintiff intended in its plea but that is not what was actually pleaded. It is not the function of the court to guess or improve on any parties' plea or case. That is the expertise of counsel. The plea is quite clear in that the resolution houses the agreement which is sought to be specifically enforced. That is why the reliefs which were set out earlier were couched in those peculiar terms.

[20] Therefore, with respect, the court cannot agree with the plaintiff that the resolution here contains an intention to create legal relationship in the terms now sought to be enforced. Unlike other situations where the subject matter of the alleged agreement

A or the price of the subject matter (if the subject matter is at all of the said land in the first place) may be determined from the surrounding circumstances, it cannot be deduced in this case. As repeatedly pointed out, this is primarily because of what the pleaded case is.

B

[21] Aside from it being a specific authorisation to the directors to sell the first defendant and its assets, it is clear that the price of such a sale is to "be determined and subject to the agreement of both parties, after the issuance and receipt of title for the C abovementioned land". Although PW1 has alleged that the defendants had concealed the issuance of the title to him, it does not alter the fact that the price of the subject matter is yet to be determined. In any case, the second part of condition two provides that the price of the sale of the company is subject to D agreement of the parties. Since there is no suggestion of any figure being bandied between the parties or that there was agreement on any figure, there are no circumstances for the court to even consider establishing what that price is; or that it is indeed RM10 million as claimed by the plaintiff.

E

[22] Having heard the witnesses, I am inclined to find that while the plaintiff, through and in the form of PW1 may have believed the price to be RM10 million, there was no *consensus ad idem* between the parties on that price. I did not find the third and F fourth defendants to be untruthful witnesses; they are elderly ladies (DW1 is 70 years old while DW2 is 71 years old) who appeared to have no real interest in the running of the first defendant and who were directors and shareholders at the second defendant's behest. They referred to the second defendant as "Datin" and they told the court that they did whatever "Datin" G told them to; especially in relation to the signing of the several documents presented in court.

[23] The real person behind the first defendant would have to be the second defendant who testified as DW3. Although I did not H believe her to be ignorant of the matters at issue, especially in relation to her understanding of the English language, I nevertheless believed her testimony that there was no agreement on the price of the sale. That had yet to be determined and agreed between the parties.

I

[24] The final critical matter that the court is compelled to deal with concerns the subject matter of the sale and this is rather fundamental: was it the first defendant company; or was it the land that was being sold between the parties. At para. 7 of the statement of claim, the plaintiff claimed that the resolution was to sell the first defendant company. Hence, the subsequent pleas relating to the preparation of copies of Form 32A. At para. 10, the plaintiff reiterated that the plaintiff had paid for premium and costs related to the land as advance payments for the sale of the shares of the first defendant at RM10 million.

[25] However, in evidence and even in the submissions made, the agreement is about the sale and purchase of land; and not the first defendant company. Both PW1 and PW2 testified about the sale and purchase of the said land. None of them testified on any sale of the first defendant with its assets which is how the claim has been framed. This is evident in Q&A 7 of PW1's evidence-in-chief where he said:

> Defendan Kedua juga memaklumkan bahawa beliau dan Defendan Pertama tidak mempunyai wang yang mencukupi untuk menjelaskan premium bernilai RM3,419.842.84 tersebut dan meminta untuk saya menjelaskan premium tanah tersebut dengan akujanji bahawa setelah Defendan Pertama berjaya memiliki tanah tersebut, tanah tersebut dan Defendan Pertama akan dijual kepada Plaintif dengan harga RM10 juta sahaja.

[26] To a question from his counsel at Q&A 9 about whether there was any agreement for the sale and purchase of the land, he answered that there was none. Later, at Q&A 12, 15, 16, 17 and 18, PW1 repeatedly referred to an agreement to sell the said land at RM10 million.

[27] From the terms of the resolution, it is apparent that what would be transacted or sold is the first defendant and its assets; whereas the letter of undertaking at pp. 18 and 19 of Bundle A refers to an agreement between the plaintiff and the second defendant for *inter alia* the sale and purchase of the said land at RM10 million. Similarly, the letter dated 6 July 2010 found at p. 20 which was signed by the second defendant refers to the receipt of RM20,000 of Bundle A as "pembayaran sebahagian harga jualan tanah s. 76 KTN Mukim Labu Daerah Sepang".

[28] Furthermore, para. 4 of this letter contains an undertaking by the second defendant not to enter into any agreement or negotiations for the sale of the said land other than with PW1. This in fact indicates the real interest of the plaintiff is in the land and not in the first defendant. All references in both the letter of undertaking and the letter of acknowledgment pertain to the sale of land; and not the sale of the first defendant company and its assets. Given such circumstances, and bearing in mind the specific remedy sought by the plaintiff is for an order of specific performance, it cannot be readily concluded what was the subject matter of the sale and whether there was any concluded agreement between the parties, be it for the sale of the company together with its assets; or the said land alone. If the sum was even agreed at RM10 million, what was this sum for? The company or the said land? While the pleaded case talks about the company, the oral and documentary evidence is about the sale of the said land. If that is the case, how then can the court begin to make any order in the terms sought?

[29] I am fortified when the submissions of the plaintiff are further examined in that it was argued that specific performance ought to be ordered because this was a transaction for the sale and purchase of land – *Chan Thiam Teng v. Ban Swee Heng Sdn Bhd* [1992] 1 LNS 37; [1992] 2 MLJ 583. This contrasts glaringly with the plaintiff's plea that it is a sale and purchase of the first defendant and its assets; not the sale and purchase of the assets, namely land, belonging to the first defendant.

[30] The remedy of specific performance is a discretionary remedy guided by certain basic principles; one of which requires the plaintiff to plead that it is ready, able and willing to complete the relevant agreement. The plaintiff has also not suggested or explained why damages are not otherwise an adequate remedy here and why the agreement must be specifically enforced. Given that the court does not find any valid and enforceable agreement for the purpose and in the terms as claimed by the plaintiff in the first place, this remedy is not available.

[31] Furthermore, the plaintiff is required to plead and "prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part". The failure to plead "brought with it the inevitable dismissal of his

suit" as pronounced by the Federal Court's decision in *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; citing with approval the English practice to be "adopted and applied by the courts in this country". Not only was there no such plea, there was no evidence at all of this readiness and willingness on the part of the plaintiff led, be it through PW1 or PW2. On this ground alone, the claim must fail.

[32] In submissions, the plaintiff had also asked the court to order damages in lieu of specific performance. Again, this was not pleaded. The plaintiff argued that since the plaintiff had taken the position that damages were not adequate remedy or compensation, the decree of specific performance was sought. The plaintiff relied on the presumption to this effect under s. 11(2) of the Specific Relief Act 1950. It was further argued that the court had discretion whether or not to grant damages in the form of the return of the payments already made by the plaintiff in order to do justice between the parties. Section 66 of the Contracts Act 1950 and several decisions were cited in support.

[33] Again, with the greatest respect, given that the claim is fraught with not just this lack of fundamental pleas, but inconsistencies and more, it will be requiring this court to exercise moral justice in the facts of this case. That is not the function of the court. Since the plaintiff itself is uncertain as to what the agreement between the parties was for, how can the court even begin to make any order, let alone a pronouncement that the agreement is not valid or enforceable? An order for return of any benefits received under s. 66 of the Contracts Act 1950 requires the court to first make that finding before proceeding to order that relief. The court is impeded and constrained in making such an order on the present facts and circumstances.

[34] I further agree with the defendants that the court cannot entertain this relief certainly not under its omnibus clause of "such further or other relief as the court deems just and proper". A substantive relief in the nature of damages cannot be said to fall within such parameters.

[35] The cases cited by the plaintiff are quite readily distinguishable in that the parties in those cases were seeking to specifically enforce agreements to buy and sell immovable property. In *Chow Chin Thong v. Dr. Chong Eng Leong* [2012] 10 CLJ 273, *Chon Then Tick v. Metroplex Development Sdn Bhd* [2010] 6 CLJ 572 and *Reignmont Estate Sdn Bhd v. Jaya Ikatan Plantations Sdn Bhd* [2012] 1 LNS 877, the subject matter of the claim was for recovery of lands. As has been repeatedly pointed out, this is clearly not the case here.

[36] Finally, the submissions of the plaintiff on the rule in *Turquand*'s case. With respect, given all that has been considered and determined, that principle really has no application in the facts of this case.

[37] For all the foregoing reasons, the court finds that the plaintiff has failed to prove its case. The plaintiff's claim is accordingly dismissed with costs. However, it is not appropriate that costs follow the event here. Instead, I am ordering that the defendants do pay the plaintiff RM10,000 as costs of these proceedings.